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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 AARON & ANDREW, INC., et al.,
12 Plaintiffs,
13 v.
14 SEARS HOLDING MANAGEMENT CORP.,
15 et al.,
16 Defendants.

Case No. CV 14-1196 SS

MEMORANDUM DECISION AND ORDER
GRANTING PLAINTIFFS' REQUEST
FOR ENTRY OF DEFAULT AGAINST
DEFENDANTS AMERICAN
INTERNATIONAL INDUSTRIES, INC.
AND NORTHEASTERN PLASTICS,
INC. (Dkt. No. 125)

17 I.

18 INTRODUCTION
19

20 Plaintiffs Aaron & Andrew, Inc. and Aaron Design, Inc. filed
21 the instant patent infringement action against Defendants Sears
22 Holdings Management Corp. ("Sears"), Kmart Corporation ("Kmart"),
23 American International Industries, Inc. ("AII"), and Northeastern
24 Plastics, Inc. ("NPI") on February 14, 2014. AII was personally
25 served with the Complaint through its registered agent for
26 service of process on March 3, 2014. (Dkt. No. 30). NPI was
27 personally served through its registered agent for service of
28 process on March 4, 2014. (Dkt. No. 23). On March 26, 2014, all

1 four Defendants jointly appeared.¹ (Dkt. No. 27). Although
2 represented by the same counsel, Miclean Gleason LLP ("Miclean"),
3 Defendants separately filed Answers to the Complaint on May 23,
4 2014. (See Dkt. Nos. 44 (AII), 45 (Kmart), 46 (NPI), & 47
5 (Sears)).

6
7 On December 12, 2014, Miclean filed a motion to withdraw as
8 Defendants' counsel of record. (Dkt. No. 96). Sears and Kmart
9 filed requests for substitution of attorney, (Dkt. Nos. 97-102,
10 104), which the Court granted on December 23-24, 2014. (Dkt.
11 Nos. 105-110). On January 13, 2015, the Court held a hearing on
12 Miclean's motion to withdraw, which by that date concerned only
13 Miclean's representation of AII and NPI. Miclean informed the
14 Court that NPI had not indicated whether it would seek new
15 representation despite having been advised that corporations may
16 not appear pro se in federal court. Counsel further stated that
17 all efforts to reach AII directly were unsuccessful.

18
19 The Court granted Miclean's motion to withdraw on January
20 15, 2015. (Dkt. No. 116). The Order authorizing the withdrawal
21 of counsel reminded the parties that corporations "may not appear
22 in any action or proceeding pro se." (Id. at 3) (citing, inter
23 alia, Rowland v. California Men's Colony, 506 U.S. 194, 202

24
25 ¹ On April 23, 2014, Defendants jointly filed a Statement of
26 Consent to Proceed before United States Magistrate Judge. (Dkt.
27 No. 35). Because Plaintiffs had already consented to magistrate
28 jurisdiction, (Dkt. No. 20), the instant matter was assigned to
the undersigned Magistrate Judge on the same date for all
purposes pursuant to 28 U.S.C. § 636(C) and Fed. R. Civ. P.
73(b). (See Dkt. No. 37).

1 (1993), and C.D. Cal. L.R. 83-2.10.1). The Court granted AII and
2 NPI thirty days, i.e., until February 17, 2015, "to reconsider
3 any decision to forego representation in this matter and to
4 engage substitute counsel." (Dkt. No. 116 at 4). Neither AII
5 nor NPI moved to substitute counsel by the Court's deadline.
6 Accordingly, on April 20, 2015, Plaintiffs filed the instant
7 "Request for Entry of Default" against AII and NPI. ("Request,"
8 Dkt. No. 125). The Request is supported by the declaration of
9 Plaintiffs' counsel Drexel A. Bradshaw. ("Bradshaw Decl.," Dkt.
10 No. 125-1).

11
12 On April 30, 2015, the Court issued a Briefing Schedule and
13 Order requiring Plaintiffs to serve copies of their Request,
14 along with copies of the Court's April 30, 2015 Briefing Schedule
15 and Order, on AII and NPI "through their respective registered
16 agents for service of process within three days of the date of
17 [the Court's] Order." (Dkt. No. 127 at 4). On May 4, 2015,
18 Plaintiffs filed a "Notice of Service of Order Pursuant to Minute
19 Order Dated April 30, 2015", which included a proof of service
20 reflecting that Plaintiffs had served the required documents on
21 AII's and NPI's registered agents for service of process on May
22 1, 2015.² (Dkt. No. 128). AII and NPI were required to file
23 their respective Oppositions to the Request for Entry of Default,
24 if any, within ten days after service of the Order on their
25 registered agents, i.e., by May 11, 2015. (Dkt. No. 116 at 4).

26
27 ² The following day, on May 5, 2015, Plaintiffs filed an amended
28 notice clarifying that the Notice itself, as opposed to the
underlying documents, was served on all parties, including AII
and NPI, on May 5, 2015. (Dkt. No. 129).

1 As of the date of this Order, no Opposition has been filed.
2 Accordingly, for the reasons stated below, the Court GRANTS
3 Plaintiff's Request for Entry of Default against AII and NPI.
4

5 **II.**

6 **STANDARDS FOR ENTRY OF DEFAULT**
7

8 Plaintiffs seek entry of default pursuant to Federal Rule of
9 Civil Procedure 55(a), which provides: "When a party against
10 whom a judgment for affirmative relief is sought has failed to
11 plead or otherwise defend, and that failure is shown by affidavit
12 or otherwise, the clerk must enter the party's default." "Entry
13 of default effects an admission of all well-pleaded allegations
14 in the complaint by the defaulted party." Johnson v. Patel, 2014
15 WL 3421002, at *1 (E.D. Cal. July 14, 2014) (citing Geddes v.
16 United Financial Group, 559 F.2d 557 (9th Cir. 1977)). Entry of
17 default, which "precludes a party from contesting liability," is
18 a prerequisite to, but independent of, entry of default judgment,
19 "which decides all aspects of the litigation." Lowe v. Elite
20 Recovery Solutions, L.P., 2008 WL 324777, at *1 n.1 (E.D. Cal.
21 Feb. 5, 2008); Vongrave v. Sprint PCS, 312 F. Supp. 2d 1313, 1318
22 (S.D. Cal. 2004) ("[E]ntry of default . . . is a prerequisite to
23 an entry of default judgment."). "A defendant's default does not
24 automatically entitle the plaintiff to a court-ordered judgment"
25 and may be challenged under the provisions of Rule 55(c).
26 PepsiCo, Inc. v. California Security Cans, 238 F. Supp. 2d 1172,
27 1174 (C.D. Cal. 2002); see also O'Connor v. Nevada, 27 F.3d 357,
28 364 (9th Cir. 1994) ("The court's discretion is especially broad

1 where, as here, it is entry of default that is being set aside,
2 rather than a default judgment.") (quoting Mendoza v. Wight
3 Vineyard Management, 783 F.2d 941, 945 (9th Cir. 1986) (internal
4 quotation marks omitted)).

5
6 "[T]he entry of default [under Rule 55(a)] (as opposed to
7 the issuance of a default judgment) normally is a ministerial
8 task for the Clerk of the Court[.]" Abur v. Republic of Sudan,
9 437 F. Supp. 2d 166, 169 (D. D.C. 2006) (brackets added; emphasis
10 and parentheses in original); Alarcon v. Shim Inc., 2007 WL
11 2701930, at *3 (N.D. Cal. Sept. 13, 2007) (entry of default is "a
12 ministerial, not judicial, act"). However, even though entering
13 default is a task normally delegated to the court clerk, the
14 court retains authority to rule on a request for entry of
15 default. As one court explained:

16
17 Despite the Rule's explicit statement that the
18 ministerial act of entering a party's default on the
19 record of the case 'must' be accomplished by 'the
20 clerk,' courts and commentators alike have held that a
21 court also may enter a party's default. For example,
22 Professors Wright, Miller, and Kane's definitive
23 treatise contains this statement, distilled from an
24 examination of numerous cases: "The fact that Rule
25 55(a) gives the clerk authority to enter a default is
26 not a limitation on the power of the court to do so."
27 10A Charles Alan Wright et al., Federal Practice and
28

1 Procedure § 2682, at 19 (3d ed.1998) (emphasis
2 supplied, footnote omitted).

3
4 Liberty Mut. Ins. Co. v. Fleet Force, Inc., 2013 WL 3357167, at
5 *1 (N.D. Ala. July 1, 2013) (citing cases). "A district judge's
6 decision about whether he or she should perform the ministerial
7 function of entering default that is assigned to the clerk by the
8 text of Rule 55(a) is vested within the judge's sound
9 discretion." Id. at 2.

10
11 The court's authority to enter default is properly exercised
12 where entry of default is sought after a party has appeared.
13 Unlike situations where the defendant entirely fails to appear or
14 defend, "[e]ntry of default after a party has appeared in an
15 action operates as a sanction" and requires the Court to weigh
16 the following five factors:

17
18 (1) the public's interest in expeditious resolution of
19 litigation; (2) the court's need to manage its docket;
20 (3) the risk of prejudice to the other party; (4) the
21 public policy favoring the disposition of cases on
22 their merits; and (5) the availability of less drastic
23 sanctions.

24
25 LegalZoom.com, Inc. v. Macey Bankruptcy Law, P.C., 2014 WL
26 961832, at *2 (C.D. Cal. Mar. 12, 2014) (quoting Adriana Int'l

1 Corp. v. Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990)).³
 2 Notably, the Ninth Circuit has explicitly found that a corporate
 3 defendant's failure to secure or retain counsel following an
 4 appearance is a sufficient ground for entry of default. See
 5 Employee Painters' Trust v. Ethan Enterprises, Inc., 480 F.3d
 6 993, 998 (9th Cir. 2007) ("[W]e have recognized default as a
 7 permissible sanction for failure to comply with local rules
 8 requiring representation by counsel."); see also United States v.
 9 High Country Broadcasting, Co., Inc., 3 F.3d 1244, 1245 (9th Cir.
 10 1993) (entry of default judgment "perfectly appropriate" where
 11 corporate defendant fails to retain counsel for the duration of
 12 the litigation); LegalZoom.com, 2014 WL 961832, at *3
 13 ("[S]triking [defendants'] answers and entering default is an
 14 appropriate sanction for [corporate defendants'] failure to
 15 retain new counsel.").

16
 17 ³ The standards for entry of default judgment are more stringent
 18 than those for entry of default. Following entry of default,
 19 district courts are authorized to grant default judgment so long
 20 as the judgment does not "differ in kind from, or exceed in
 21 amount, what is demanded in the pleadings." Fed. R. Civ. P.
 22 54(c). "Factors which may be considered by courts in exercising
 23 discretion as to the entry of a default judgment include: (1) the
 24 possibility of prejudice to the plaintiff, (2) the merits of
 25 plaintiff's substantive claim, (3) the sufficiency of the
 26 complaint, (4) the sum of money at stake in the action; (5) the
 27 possibility of a dispute concerning material facts; (6) whether
 28 the default was due to excusable neglect, and (7) the strong
 policy underlying the Federal Rules of Civil Procedure favoring
 decisions on the merits." Eitel v. McCool, 782 F.2d 1470, 1471-
 72 (9th Cir. 1986). In considering the Eitel factors, "all
 factual allegations in the complaint are taken as true, except
 for those relating to damages." Solis v. Patel, 2012 WL 5389822,
 at *1 (N.D. Cal. Nov. 2, 2012). However, in keeping with the
 federal policy favoring resolution of disputes on the merits,
 "default judgments are ordinarily disfavored." Eitel, 782 F.2d
 at 1472.

1 **III.**

2 **DISCUSSION**

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4 The Court finds that the five factors a court must consider
5 when default is requested following a defendant's appearance
6 favor entry of default here. See Adriana Int'l Corp., 913 F.2d
7 at 1412.

8
9 **A. Expeditious Resolution And The Court's Need To Manage Its**
10 **Docket**

11
12 In the instant action, the first two factors -- the public's
13 interest in expeditious resolution of litigation and the Court's
14 need to manage its docket -- favor entry of default. The failure
15 of AII and NPI to secure counsel hinders the Court's ability to
16 move this case toward disposition and indicates that AII and NPI
17 do not intend to litigate this action diligently. As a result,
18 the first two factors favor entry of default.

19
20 **B. The Risk Of Prejudice To The Party Seeking Entry Of Default**

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22 The third factor -- prejudice to the other party -- also
23 favors entry of default. "Unreasonable delay is the foundation
24 upon which a court may presume prejudice." Southwest Marine Inc.
25 v. Danzig, 217 F.3d 1128, 1138 (9th Cir. 2000). Here, neither
26 AII nor NPI has offered any excuse for their failure to obtain
27 substitute counsel. Accordingly, this factor favors entry of
28 default.

1 **C. Less Drastic Alternatives**

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3 The fourth factor -- the availability of less drastic
4 alternatives -- also favors entry of default. The Court afforded
5 ample notice and opportunity to AII and NPI to obtain substitute
6 counsel, first by granting thirty days to obtain substitute
7 counsel when the Court approved Miclean's motion to withdraw,
8 then by granting an additional ten days to obtain counsel to
9 oppose Plaintiffs' Request for Entry of Default. However, AII
10 and NPI failed on both occasions to comply with the Court's
11 Order. Alternatives other than entry of default are not
12 appropriate given the extended period the Court has provided to
13 AII and NPI to obtain substitute counsel and AII's and NPI's
14 failure to do so.

15
16 **D. Public Policy Favoring Disposition On The Merits**

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18 The final factor -- the public policy favoring the
19 disposition of cases on their merits -- ordinarily weighs against
20 entry of default. However, this litigation is at an impasse with
21 respect to Plaintiffs' claims against AII and NPI due to AII's
22 and NPI's prolonged refusal to obtain counsel. Under these
23 circumstances, the public policy favoring the resolution of
24 disputes on the merits does not outweigh AII's and NPI's
25 unexplained failure to secure substitute counsel and does not
26 preclude entry of default. See Solis, 2012 WL 5389822, at *2
27 (default judgment warranted where defendants' failure to appear
28

1 despite knowledge of the pending litigation renders it "unlikely
2 that a decision on the merits is reasonably possible").

3
4 **IV.**

5 **CONCLUSION**

6
7 For the foregoing reasons, Plaintiffs' Request for Entry of
8 Default against Defendants AII and NPI is GRANTED. The Answers
9 to the Complaint filed by AII (Dkt. No. 44) and NPI (Dkt. No. 46)
10 are hereby STRICKEN. The Clerk of the Court is DIRECTED to enter
11 default against AII and NPI pursuant to Federal Rule of Civil
12 Procedure 55(a). Counsel for Plaintiffs is ORDERED to serve
13 copies of this Order by United States mail on AII's and NPI's
14 registered agents for service of process and to file the proof of
15 service with the Court within seven days of the date of this
16 Order.

17
18 IT IS SO ORDERED.

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20 DATED: June 5, 2015

21 /S/
22 SUZANNE H. SEGAL
23 UNITED STATES MAGISTRATE JUDGE
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